

STATE OF MICHIGAN  
IN THE SUPREME COURT

CLAM LAKE TOWNSHIP, A MICHIGAN  
GENERAL LAW TOWNSHIP; AND  
HARING CHARTER TOWNSHIP, A  
MICHIGAN CHARTER TOWNSHIP,

Supreme Court No. 151800

Court of Appeals No. 325350  
Wexford County Circuit Court  
Case No. 14-25391-AA

Plaintiffs-Appellants,

v

THE STATE BOUNDARY COMMISSION,  
AN ADMINISTRATIVE AGENCY WITHIN  
THE MICHIGAN DEPARTMENT OF  
LICENSING AND REGULATORY  
AFFAIRS; TERIDEE LLC, A MICHIGAN  
LIMITED LIABILITY COMPANY; AND,  
THE CITY OF CADILLAC, A MICHIGAN  
HOME RULE CITY,

Defendants-Appellees.

**The appeal involves a ruling  
that a provision of the  
Constitution, a statute, rule or  
regulation, or other State  
governmental action is invalid.**

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**THE STATE BOUNDARY COMMISSION'S BRIEF IN OPPOSITION TO  
CLAM LAKE AND HARING TOWNSHIPS'  
APPLICATION FOR LEAVE TO APPEAL**

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Dated: July 13, 2015

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**COUNTER-STATEMENT OF QUESTIONS PRESENTED**

1. Section 11a of the Boundary Commission Act, MCL 123.1011a, authorizes the State Boundary Commission to consider and decide petitions for annexation. Courts recognize that, in light of this broad grant of statutory authority, the State Boundary Commission possesses the power and jurisdiction to consider the validity of any agreements that, if valid, would bar its authority to decide such petitions. Did the State Boundary Commission properly consider whether, and thereafter correctly decide that, an "agreement" purporting to block its jurisdiction was invalid?

Appellants' answer: No.

Appellees' answer: Yes.

Circuit court's answer: Yes.

2. A reviewing court must affirm an agency's decision if it is not arbitrary or capricious and is supported by competent, material and substantial evidence on the whole record. Did the circuit court apply correct legal principles and the substantial evidence test when it affirmed the State Boundary Commission's decision granting annexation?

Appellants' answer: No.

Appellees' answer: Yes.

Circuit court's answer: Yes.

**COUNTER-STATEMENT OF JUDGMENT /  
ORDER APPEALED FROM AND RELIEF SOUGHT**

On December 9, 2014, the Wexford Circuit Court issued an opinion on appeal affirming the Commission's June 26, 2014 decision granting the underlying annexation petition. The Townships filed an application for leave to appeal, as provided under MCR 7.203(B)(3), which the Court of Appeals denied "for lack of merit in the grounds presented." This Court has jurisdiction to consider the instant application for leave to appeal under MCR 7.301(A)(2).

## REASONS FOR DENYING THE APPLICATION

Appellants Clam Lake and Haring Townships (collectively “the Townships”) seek leave to appeal from the Wexford Circuit Court’s opinion and order affirming the State Boundary Commission’s approval of a petition to annex land from Clam Lake to the City of Cadillac. This Court should deny the Townships’ application for leave for three reasons:

First, and foremost, the Townships’ application for leave to appeal has already been unanimously rejected by a Court of Appeals panel “for lack of merit in the grounds presented.” The warmed-over arguments presented in the instant application, which have been uniformly rejected at each of the three lower administrative and judicial levels, offer no grounds to suggest that further judicial review is warranted.

Second, there is nothing jurisprudentially significant about this case. It represents a garden variety administrative appeal of an agency decision wherein the circuit court properly applied the correct standard of review in affirming the agency’s decision.

Third, there is nothing incorrect (much less “clearly erroneous”) in the circuit court’s detailed opinion affirming the agency’s decision. The circuit court applied correct legal principles when it determined that the agency had jurisdiction to consider, and thereafter properly approved, the underlying annexation petition.

For these reasons, and those discussed below, the Commission joins its fellow Appellees in respectfully requesting that the Court summarily deny the application for leave to appeal.



## INTRODUCTION

This appeal stems from an administrative proceeding before the Commission that resulted in a decision approving the annexation of land from Clam Lake to the City of Cadillac. The Townships argue on appeal that the decision approving the annexation is contrary to law because the annexed territory was subject to a conditional transfer agreement between them pursuant to Act 425 of 1984 (“Act 425”), which barred the annexation of the territory. But the Townships’ argument rests on an erroneous premise: that their purported “Act 425 agreement” was actually in effect. In fact, it was not. Rather, the Commission, which has jurisdiction to consider the validity of such agreements as part of its review concerning petitions for annexation covering the same territory, decided that the Townships’ agreement did not satisfy the statutory criteria under Act 425 and, thus, was not valid. What is more, in a *separate* declaratory action concerning *the exact* “Act 425 agreement” at issue, the circuit court independently ruled that it was *invalid*. (Wexford Circuit Court Docket 2013-024803; currently pending appeal as of right in COA Docket 324022.) Accordingly, the Townships’ invalid “Act 425 agreement” could not, and ultimately did not, preclude the Commission from approving the underlying annexation petition.

The Townships also assert that the Commission’s decision to grant the annexation was “arbitrary, and capricious” because the Commission had previously rejected a similar annexation petition involving the same territory and, thus, was allegedly bound to deny the instant petition under the doctrine of collateral estoppel.

But the circuit court correctly concluded that (1) the Commission had jurisdiction to consider the underlying annexation petition; and (2) that the decision to grant the annexation petition is supported by competent, material, and substantial evidence on the whole record. Accordingly, the circuit court properly applied the applicable standard of review in affirming the Commission's decision.

## COUNTER-STATEMENT OF FACTS

### Proceedings before the Commission.

This is the second time TeriDee has filed a petition for annexation covering the same area. The first petition, which was filed on June 3, 2011, was denied by the Commission in Docket No. 11-AP-2. (Record of Proceedings, Vol 1, Item 3b.) The instant annexation proceeding began on June 5, 2013 when TeriDee filed a petition with the State Boundary Commission requesting the annexation of land from Clam Lake to the City of Cadillac. (Vol 1, Item 1a.) TeriDee indicated that it initiated the petition in order to gain immediate and economical access to public sewer and water services, which could be offered immediately by Cadillac but not by Clam Lake. (Vol 1, Item 4.)

In accordance with the Commission's rules, the petition was processed as an "active docket" (No. 13-AP-2), with notice sent to interested parties indicating that the Commission would consider the legal sufficiency of the petition at an upcoming adjudicative session. (Vol. 1, items 1b and 3a.)

On June 13, 2013, the Townships filed an appearance on Docket No. 13-AP-2, along with a "notice" indicating that the property that was the subject of the annexation petition was no longer located within Clam Lake; rather, pursuant to an agreement executed between the Townships under Act 425 of 1984 ("Act 425"), the subject property had been conditionally transferred (along with certain contiguous lands) from Clam Lake to Haring. The "notice" further stated that, as a result of

the Townships' transfer agreement, annexation of any portion of the subject property was barred by Act 425.<sup>1</sup>

On August 13, 2013, the Commission held a meeting to consider the legal sufficiency of the annexation petition, at which time the petition was declared to be legally sufficient (Vol 1, Item 3g) and a public hearing on the annexation was scheduled for October 23, 2013. (Vol 1, Item 6a.)

Prior to the public hearing, TeriDee, Cadillac, and the Townships, respectively provided detailed information to the Commission in response to questionnaires sent out to them by the Commission staff. (Vol 1, Item 4a-e.) At the October 23, 2013 hearing, the parties (along with the general public) were given the opportunity to comment on the pending annexation petition, along with the Townships' transfer agreement covering the same territory. (Vol 1, Item 6d.) The Commission also invited the submission of written comments. (Vol 1, Items 7-8.)

At an adjudicative session held on April 16, 2014, the Commission decided, by a 4-1 vote, to approve the annexation petition. (Vol 2, Item 11c-d.) On June 11, 2014 (its next regularly scheduled meeting), the Commission approved the minutes from its April 16, 2014 meeting and signed (through its Chair, Dennis Schornack) the "Summary of Proceedings, Findings of Fact, and Conclusions of Law" for this annexation petition, which was entered as a final order by Steve Arwood, the then-

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<sup>1</sup> The Townships filed with the Secretary of State a first and second amendment to this transfer "agreement" on October 21, 2013 and March 14, 2014, respectively. (Vol 1, Item 5a; Vol 2, Item 9a.)

acting Director of the Michigan Department of Licensing and Regulatory Affairs (LARA), on June 26, 2014. (Vol 2, Item 13a.)

**Role of the Commission in making annexation decisions.**

The Commission was created by the State Boundary Commission Act, MCL 123.1001 *et seq.* Section 11a of the Boundary Commission Act authorizes the Commission to consider and decide petitions for annexation:

The Commission shall have jurisdiction over petitions or resolutions for annexation as provided in section 9 of Act No. 279 of the Public Acts of 1909 (Home Rule Cities Act), as amended. [MCL 123.1011a]

Section 9 of the Home Rule Cities Act, MCL 117.9, provides in pertinent part:

(2) Except as provided in subsections (1) and (8), a petition or resolution for annexation of territory shall be filed with the state boundary commission created under 1968 PA 191, MCL 123.1001 to 123.1020. The commission, after determining the validity of the petition or resolution, shall hold a public hearing in or reasonably near the area proposed for annexation. The commission in processing and approving, denying, or revising a petition or resolution for annexation shall have the same powers and duties as provided under 1968 PA 191, MCL 123.1001 to 123.1020, relating to petitions which propose incorporations.

The Commission was established to consider petitions for incorporation and consolidation of cities and villages as well as petitions for the annexation of territory in a township to a city. See: State Boundary Commission Act, 1968 PA 191, as amended, MCL 123.1001 *et seq.*, and Section 9 of the Home Rule City Act, 1909 PA 279, as amended, MCL 117.9.

Under Executive Orders 1996-2, paragraph II (5), 2003-18, paragraph II (A) (1), and 2011-4, paragraph (1) (A), the Director of LARA exercises the powers of the State Boundary Commission.

Executive Order 1996-2, paragraph II (5) states in part:

All the statutory authority, powers, duties, functions and responsibilities of the State Boundary Commission created by Act No. 191 of the Public Acts of 1968, as amended, being Sections 123.1001 et seq, of the Michigan Compiled Laws, are hereby transferred from the Department of Commerce to the Director of the Department of Consumer and Industry Services by a Type II transfer as defined by Section 3 of Act No. 380 of the Public Acts of 1965, as amended, being Section 16.103 of the Michigan Compiled Laws.

Executive Order 2003-18, paragraph II (A) states in part:

(1) Consistent with Article V, Section 2 of the Michigan Constitution of 1963, which limits the number of principal departments to 20, the Department of Consumer and Industry Services is renamed the Department of Labor and Economic Growth and will continue as a principal department of the Executive Branch.

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(6) The Director of the Department of Labor and Economic Growth may perform a duty or exercise a power conferred by law or executive order upon the Director at the time and to the extent the duty or power is delegated to the Director by law or order.

Executive Order 2011-4, paragraph (1) states in part:

(A) The Department of Energy, Labor, and Economic Growth is renamed the Department of Licensing and Regulatory Affairs.

Pursuant to these Executive Orders, the Commission is a Type II advisory board to the Director of LARA who is charged with exercising the powers of the Commission.<sup>2</sup>

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<sup>2</sup> The advisory role of type II agencies is discussed in OAG , 1965-1966, No 4479A, pp 262, 278 (May, 1966).

**Criteria for exemption from annexation under section 9 of the Intergovernmental Conditional Transfer of Property by Contract Act, MCL 124.29.**

The Intergovernmental Conditional Transfer of Property by Contract Act (Act 425), MCL 124.21 *et seq*, permits local units of government units to conditionally transfer property for the purposes of promoting an “economic development project.” See MCL 124.21. Section 1 of Act 425 defines “economic development project” as:

[L]and and existing or planned improvements suitable for use by an industrial or commercial enterprise, or housing development, or the protection of the environment, including, but not limited to, groundwater or surface water. Economic development project includes necessary buildings, improvements, or structures suitable for and intended for or incidental to use as an industrial or commercial enterprise or housing development; and includes industrial park or industrial site improvements and port improvements or housing development incidental to an industrial or commercial enterprise; and includes the machinery, furnishings, and equipment necessary, suitable, intended for, or incidental to a commercial, industrial, or residential use in connection with the buildings or structures.

Relevant to this appeal, section 7 of Act 425 requires, in pertinent part, that a conditional transfer agreement include “specific authorization for the sharing of taxes and any other revenues designated by the local units” and “[t]he manner and extent to which the taxes and other revenues are shared shall be provided for in the contract.” See MCL 124.27.

Once a conditional transfer of property has been filed with the Secretary of State and is entered thereby, a certified copy of such agreement constitutes “prima facie evidence of the conditional transfer” (See MCL 124.30) but is not conclusive. In particular, when a petition for annexation covers territory that is subject to an Act 425 agreement, the Commission has the authority to examine the agreement

and determine whether it complies with Act 425. If it does, then (and only then) will it act as a statutory bar to annexation, as provided under section 9 of Act 425, MCL 124.29. ("While a contract under this act is in effect, another method of annexation or transfer shall not take place for any portion of an area transferred under the contract.) If it does not, the Commission is authorized to consider an annexation petition on its merits under the applicable statutory criteria.

**The Commission's consideration of the issues in this case.**

As discussed, TeriDee sought to annex the territory at issue to Cadillac so it could, thereafter, develop a retail center on the property it owned therein. (Vol 1, Item 4b, page 1.) In its response to a questionnaire of the Commission staff on October 8, 2013, TeriDee summarized why it considered the proposed annexation to be necessary:

TeriDee has been trying to develop this property for a retail center for over five years, but has been stymied by actions of Clam Lake Township and Haring Charter Township. There is a demand for such development at this location.

*Clam Lake Township does not own municipal sewer or municipal water services.* The City of Cadillac has available City sewer and water services in the immediate vicinity which can be provided on a cost effective and timely basis to the proposed development. Petitioners desire to connect to City sewer and water services. The City has indicated its willingness to provide those services to the property when it is annexed. The proposed development will provide a significant number of much needed jobs for the area as well as a significant increase to the area's tax base. [Vol 1, Item 4b, page 1 (emphasis added).]

TeriDee also stated that, after exploring possible alternatives, it considered annexation to Cadillac to be its best and only viable option for obtaining immediate and cost-effective access to public sewer and water services. (Vol 1, Item 4b, page



3.) In its response to the Commission's questionnaire, Cadillac confirmed its ability and willingness to provide the subject property with public sewer and water services if the annexation were approved. (Vol 1, Item 4c.)

The Townships objected to the annexation on several grounds, the primary one being that the subject property allegedly was already covered by a purported Act 425 agreement and, thus, was shielded from annexation. (Vol I, Items 4d-e) In addition, the Townships asserted that the annexation petition should be denied because it did not "comply with or advance any of the essential 18 criteria" under section 9 of the Boundary Commission Act, MCL 123.1009. (Vol 2, Item 7c, page 40.) In particular, the Townships complained that the development contemplated by the annexation petition would conflict with the local and regional "land use plans for the area." (Vol 1, Item 4D, page 19; Vol 1, Item 4e, page 19.) The Townships also reiterated that they had "joined in the Act 425 Agreement to assure that only reasonable-scale, high quality commercial development can occur in the immediate proximity to the highway interchange, but in a manner that is protective of existing residential populations, through requirements for buffers, open space and additional residential use." (Vol 2, Item 7, page 40.)

After considering all of the testimony and other information in the record, the briefs and the arguments of the parties, the Commission concluded that (1) the Townships' claimed-Act 425 Agreement was not valid and, thus, did not preclude its consideration of the annexation petition; and (2) that the petition met the criteria for annexation set forth in in section 9 of the Boundary Commission Act, MCL

123.1009. Based on these conclusions, the Commission recommended—and the Director of LARA approved—granting the petition for annexation.

## STANDARD OF REVIEW

In *Boyd v Civil Service Commission*, 220 Mich App 226, 233; 559 NW2d 342 (1996), the Court held that the applicable standard applied when reviewing a lower court's review of an agency action is:

[W]hether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence. As defined in numerous other contexts, a finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. n5

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n5 See, e.g., *Silver Dollar Cafe* [441 Mich 110; 490 NW2d 337 (1992)] n 4, 441 Mich at 116-117; *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976).

This Court has also explained that when applying the substantial evidence test, judicial review of administrative agency decisions must not invade the agency's exclusive fact-finding authority by displacing an agency's choice between two reasonably differing views:

When reviewing the decision of an administrative agency for substantial evidence, a court should accept the agency's findings of fact if they are supported by that quantum of evidence. A court will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record. [*In re Payne*, 444 Mich 679, 692-693; 517 NW2d 121 (1994).]

Thus, the standard of review in this Court is to determine whether the circuit court applied correct legal principles and whether it misapprehended or grossly

misapplied the substantial evidence test when it reviewed the Commission's decision.

Furthermore, as it concerns the primary issue raised in this appeal, the Court of Appeals in *Casco Township v State Boundary Commission*, 243 Mich App 392, 395; 662 NW2d 332 (2000), specifically held that the Commission's determination regarding the validity of an Act 425 agreement is subject to the "substantial evidence test":

The [issue] is whether competent, material, and substantial evidence supported the commission's determination that the Act 425 agreements were merely a pretext to avoid annexation.

Questions of statutory interpretation are reviewed de novo. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312, 645 NW2d 34 (2002). If the statute is unambiguous, judicial construction is neither required nor permitted. In other words, "[b]ecause the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute." *Id.*

This standard of review applies to both arguments.

## ARGUMENT

- I. **The Commission properly considered whether, and thereafter correctly decided that, the purported Act 425 Agreement was invalid and, thus, did not bar annexation of the territory at issue.**

As an initial matter, it is necessary to emphasize that this case does not raise any novel legal issues, and certainly none involving legal principles of major

significance to the State's jurisprudence. Rather, this latest filing represents merely the Townships' most recent attempt in its long-fought, unsuccessful battle to block the underlying annexation petition. Having lost at every turn, the Townships now demand extraordinary relief, which by their own acknowledgment hinges on this Court "undo[ing]" the settled holding of *Casco Township*. (App Br, 13.) As discussed more fully ahead, the Townships' arguments are groundless and their claims should be rejected.

**A. The Commission has the authority to consider the validity of the purported Act 425 Agreement.**

Contrary to the Townships' argument ("THE SBC DOES NOT HAVE SUBJECT MATTER JURISDICTION TO DECIDE THE VALIDITY OF AN ACT 425 AGREEMENT") (App Br, 13), the Commission most certainly *does* possess the statutory authority and jurisdiction to decide the validity of the Act 425 Agreement at issue as part of its consideration of an annexation petition covering the same territory. As noted, the Court of Appeals squarely considered and decided this issue in the *Casco* when it held:

In light of the broad grant of statutory authority to the commission over matters relating to the establishment of boundaries and annexations, we hold that the commission had the authority and jurisdiction to decide the validity of the Act 425 agreements. Logic dictates that the commission had the authority to consider the validity of two agreements that, if valid, would have barred its authority to process, approve, deny, or revise a petition or resolution for annexation. The commission would not otherwise have been able to perform its function of resolving the petition. [*Casco Twp*, 243 Mich App at 399. (Internal citations omitted.)]

Accordingly, the Townships' argument that the Commission lacks the authority to decide the validity of a 425 agreement under the circumstances of this case is without merit and should be rejected. (App Br, 14-18.)

Furthermore, and contrary to the Townships' argument, *Casco* hardly turned our state law "on its head." (App Br, 18.) If anything, the Townships' arguments in support of their sham "Act 425 agreement" demonstrate the wisdom – and necessity – of the *Casco* decision.<sup>3</sup> Were the Townships' claims to be accepted, then the proclamation by any amenable municipal cohorts would suffice to interminably frustrate any and every annexation petition that they might oppose. A petitioner seeking annexation, like TerieDee, would face the impossible task of initiating a declaratory action to determine the validity of any and every so-called agreement until each is finally resolved by the Courts. In the meantime, Townships could trumpet their purported "Act 425 agreement(s)" to block the Commission's consideration of a pending annexation petition affecting the same territory. And nothing would prevent the Townships from executing numerous, successive "Act 425 agreements," no matter their validity, to effectively insulate their territories from annexation.<sup>4</sup> This cannot possibly be the result that the Legislature intended when it created the Commission and vested it with specific jurisdiction to consider

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<sup>3</sup> It bears repeating that TeriDee successfully challenged the validity of the Townships' "Act 425 agreement" in a separate action filed in 2013. Nevertheless, an appeal remains pending nearly two years later.

<sup>4</sup> Here, in fact, the Townships' purported "Act 425 agreement" was the culmination of not one or two, but *three* separate documents (styled as "amendments") that were executed over the course of several months.

such annexation petitions. Nor could the Legislature have intended to empower municipalities to ward off annexation by executing phony contracts—contracts known in municipal law as “shark repellent.” *Casco Twp*, 243 Mich App at 400, 402.

Instead, the more logical approach is aptly captured by the *Casco* decision – one that permits the Commission to exercise its statutory function of resolving said petitions—and also preserves judicial and administrative economy. And, as demonstrated immediately ahead, the Commission properly applied the substantial evidence test, and thereafter correctly decided that the Townships’ purported “Act 425 agreement” was a sham. For these reasons, the Court should decline the Townships’ invitation to “undo” *Casco*.

**B. There is substantial evidence to support the Commission’s determination that the Townships’ purported 425 Agreement was a sham.**

The record reflects that the Commission specifically considered whether the Townships’ conditional transfer agreement met the applicable criteria of Act 425 and concluded that it did not. To wit, the Commission identified numerous deficiencies in the Townships’ agreement—all of which support the Commission’s principal conclusion that the purported agreement was merely a pretext to thwart the instant annexation petition, as it was not being used to promote an economic development purpose. This is exactly the type of illusory agreement that the Court of Appeals held to be a “sham” in *Casco*.

**1. The Townships' "agreement" lacked a clearly defined economic development project.**

The Townships' initial "Act 425 agreement" that purported to conditionally transfer the very same territory that is covered by the annexation petition now at issue (and was filed five days afterward) described the territory as being "proposed for the implementation of an economic development project under Act 425," with said economic development project consisting of two aspects:

- (a) the construction of a mixed-use, commercial/residential development that is designed and constructed in accordance with principles of planned unit development (as described further in Article I, Paragraph 6 of this Agreement), in order to balance the property owners' desire for commercial use with the need to protect the interests of surrounding residential property owners; and,
- (b) the provision of public wastewater services and public water supply services to the Transferred Area, so as to foster the new mixed-use development and to provide the protection of the environment, including, but not limited to, protection of ground water and surface water on and below the Transferred Area.

The Commission concluded that, notwithstanding these empty, circular recitals, the agreement did not, in fact, identify an "economic development project that is allowed by Act 425." (Vol 2, Item 13a, page 3, paragraph 6a.) Among numerous other deficiencies, the Commission observed that the Townships did not consult the owner of the property—*TeriDee*—for whom these "provisions" were ostensibly made.

The Townships' attack the Commission's sensible observation in this regard on grounds that it evinces an "erroneous belief that lack of prior meeting with the land owner constitutes a legal ground on which to invalidate an Act 425 Agreement"



and that “[n]owhere in the Act 425 statute does it state that local units must first meet with the property owner before entering a conditional transfer agreement.” (App Br, 35.) With respect, the Townships’ argument misses the mark. That is to say, regardless of any “plan” that the Townships’ might have concocted, the execution of a plan would depend on the willingness of the very person they did not even bother to consult: *TeriDee*. Indeed, it is not a far stretch to imagine that the Townships might have “allowed” instead for *TeriDee*’s property to be developed as an amusement park, by prescribing height restrictions for roller coasters, planning the layout of concession stands, designating the number of parking spots, and so forth. But what the Townships’ argument fails to take into account is that hoping, then “allowing,” for a certain type of “reasonable, quality development to occur” (App Br, 32) neither constitutes an economic development plan, nor is indicative of actual economic development.

Furthermore, despite the Townships’ subsequent efforts to bolster the purported “economic development project” provisions through the filing of two amendments (Vol 1, Item 5a; and Vol 2, Item 9a), the fact remains that no such “project” was ever identified. Accordingly, the Commission’s conclusion is supported by substantial evidence and was properly affirmed by the circuit court.

In arguing to the contrary, the Townships baldly assert that the mere “provision” of waste water services and zoning restrictions constitute “planned improvements” and, thus, satisfy the requirements of Act 425. (Townships’ Br, 24-

30.) But the Townships still do not (and presumably cannot) identify an actual *planned improvement* upon which the purported transfer of land was premised.

Furthermore, if the Townships' argument were to be accepted, then the mere "provision," or allowance, of utilities or economic development, could be used as a basis to insulate every corner of the Township from future annexation. As such, their circular argument – that an "economic development project" has been established within the meaning of Act 425 by their "provision" of water for a hypothetical development that they would "allow" – is not supported either logically or factually and was properly rejected by the Commission.

**2. The Townships' 425 "agreement" did not provide for revenue sharing, as required by Act 425.**

As noted, section 7 of Act 425 requires that a conditional transfer agreement include "specific authorization for the sharing of taxes and any other revenues designated by the local units" and "[t]he manner and extent to which the taxes and other revenues are shared shall be provided for in the contract." The Commission determined that the Townships' purported conditional transfer agreement did not meet the requirements of this section because Clam Lake would not receive any benefit, i.e., revenue sharing, from the purported land transfer. Instead, Haring would keep *all* of the revenue. (Vol 2, Item 13a, page 3, paragraph 6b.) Although the Townships do not dispute the fact that Haring would keep *all* of the revenue,

they try to put a novel spin on this arrangement by characterizing Clam Lake as “sharing” 100% of the revenue with Haring. (App Br, 36.) That claim was likewise properly rejected for lack of merit.

**3. The timing and circumstances surrounding the Townships’ purported adoption of the transfer “agreement” support the Commission’s conclusion that that it was merely a pretext to block annexation.**

In addition to concluding that the Townships’ purported Act 425 agreement was lacking, the Commission also determined that the timing and circumstances surrounding the adoption of the agreement indicated that it was conceived and entered into merely as a pretext to block TeriDee from filing an annexation petition. The Commission’s finding in this regard is amply supported by record evidence, which included the Townships’ history of entering into a prior “sham” 425 Agreement to block a previous petition for annexation by TeriDee, and the fact that the instant attempt followed in those same footsteps.

Furthermore, e-mails exchanged between Township officials and area residents discussing ways to block TeriDee’s planned development show that the timing of the Townships’ ensuing 425 “agreement” was no coincidence. For instance, these e-mails discussed TeriDee’s planned development, along with county-level zoning changes to accommodate the same, as a “**New threat on the horizon . . .**” (Vol 2, Item 13a, Exhibit D, e-mail from George Giftos sent on February 21, 2013 at 08:17.)<sup>5</sup> The e-mails reflect concern that, “[i]f County

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<sup>5</sup> George Giftos is a member of the Haring Township Planning Commission.

Commissioners eliminate zoning immediately . . . TeriDee would have the ability to begin their development.” (Vol, 2, Item 13, Exhibit D, e-mail from George Giftos sent on February 21, 2013 at 08:17.) Discussions soon centered on a question posed by George Giftos: “I wonder if it’s time to pursue another 425 agreement to cover the property by Haring’s zoning?” (Vol 2, Item 13a, Exhibit D, e-mail from George Giftos sent on February 21, 2013 at 10:01.)

There can be no question that these e-mails neatly dovetail with the Townships’ ensuing “agreement” to transfer the subject property pursuant to Act 425, which was reached during a hastily convened special “Joint Public Hearing” convened by the Townships on May 8, 2013, the purpose of which was succinctly described in another Giftos e-mail:

As you know, last year, the State Boundary Commission ruled that the 425 annexation agreement between Clam Lake and Haring Townships was invalid. They also voted 3-2 to deny the annexation of the TerriDee [sic] property at the Southeast Corner of the M55/131 interchange to the City of Cadillac. One of the reasons for the reversal of the annexation between Clam Lake and Haring was that there was no plan for any economic improvement by that move. In the meantime, Clam Lake has been negotiating with the City for water and sewer in their DDA district and McGuire’s Resort. They thought they had a deal, but the City changed their demands and would only decide to provide those services to Clam Lake as long as they would allow the annexation of that property to the City. (These are the same City officials who told me last year that they didn’t want that property!). Allowing the City to annex that property would set a precedent and could result in further property loss from Clam Lake to the City. Talks with the City for these services have ceased and Clam Lake again began discussing the possibility of obtaining those services from Haring (Haring is set to begin construction on their own water treatment plant)

Current plans are to reenter into a 425 agreement between Clam Lake and Haring Townships with the objective to provide sewer service to the TerriDee [sic] property and continue to the Clam Lake DDA

district. This plan also allows for rezoning and development of that property as a PUD, with a set of restrictions as to the development of that property. These restrictions are necessary to protect the surrounding residential areas, and recognize that another bout with the State Boundary Commission could result in their allowing annexation to the City. That would result in a development far more distasteful than the one proposed in our agreement. I know that most of us would prefer no development at all, but long term, that's not practical. At some point in the future, that property will be developed and this proposed zoning would be in our best interests. This is a proactive step and after sifting through several meetings during the development of this plan, I can live with it. Our best plan of action is to support this plan. [Vol 2, Item 13a, e-mail from George Giftos sent on May 2, 2013 at 02:35.]

Suffice it to say, these e-mails leave a distinct and lasting impression that the Townships' purported "agreement" to transfer the subject property was motivated solely as a means to thwart, by any means necessary, TeriDee's planned development. Accordingly, the Commission properly considered these e-mails, and thereafter reasonably concluded that they support a finding that the Townships' purported agreement was not valid. (Vol 2, Item 13a, pages 3-4, paragraphs 6d-e.)

**II. The Commission's decision granting annexation, which was approved by the Director of LARA, is supported by competent, material, and substantial evidence and was properly affirmed.**

Since the Commission had the authority to determine the validity of the Townships' 425 "agreement" (and concluded that it was *not* valid), the only question remaining is whether the Commission's decision to approve the annexation petition was supported by competent, material, and substantial evidence. Here, the record plainly demonstrates, and the circuit court properly concluded, that the Commission approved the annexation petition in accordance with the applicable statutory criteria.

The Townships do not challenge the evidentiary support for the Commission's decision. Instead, the Townships claim the Commission should have denied the petition – as it denied a similar one two years earlier—on the basis of “collateral estoppel.” (App, 43.) But the Townships' argument ignores the fact that section 9(6) of the Home Rule Cities Act contemplates, and thus implicitly confers upon the Commission the authority to consider, such re-filings:

(6) The commission shall reject a petition or resolution for annexation of territory that includes all or any part of the territory which was described in any petition or resolution for annexation filed within the preceding 2 years and which was denied by the commission or was defeated in an election under subsection (5).

If the Legislature intended to forever preclude the re-filing of an annexation petition that covered territory that had been previously denied by the Commission, it could have said so. Instead, the Legislature expressly provides for a *two-year* waiting period before such petition may be re-filed. Furthermore, as discussed immediately below, petitions filed with the Commission are considered on their respective merits in accordance with criteria set forth in MCL 123.1009.

**A. The Commission's decision to approve the annexation petition is not arbitrary or capricious and principles of collateral estoppel do not apply.**

Generally, collateral estoppel precludes relitigation of an issue in a subsequent, different case between the same parties if the prior action resulted in a valid *final judgment* and the issue was actually and necessarily determined in the prior action. *Horn v Dep't of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996). But, three additional requirements must be satisfied to establish collateral

estoppel based on an administrative decision. *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995). Specifically, the administrative decision must have been adjudicatory in nature, the decision must provide a right to appeal, and the Legislature must have intended to make the decision final absent an appeal. *Id.* Based on the plain language of the statute, prior denial of a petition for annexation does not compel the denial of a subsequent petition for annexation that covers the same area. Rather, a petitioner may seek, and the Commission may consider, a petition for annexation that is filed in accordance with the State Boundary Commission Act, MCL 123.1001 *et seq*, the Home Rule Cities Act, MCL 117.1 *et seq*, and the Commission's duly promulgated rules.

The Legislature did not intend that collateral estoppel would apply to annexation denials by the Commission. Rather, the Legislature provided that, following a denial, a petitioner may file a new petition after two years, and the Commission is given discretion to consider the statutory factors in determining whether to grant the petition. Consequently, the doctrine of collateral estoppel did not (nor does it) bar the Commission from reaching a different conclusion regarding a subsequent petition for annexation.

Simply put, the Commission's consideration of any previous petition is not a factor specified in MCL 123.1009. There is no ambiguity in the statute. Where the meaning of language is plain and unambiguous, it is not necessary to reach strained interpretations; all that is required is that the statute simply be applied as written.



*Avon Twp v Michigan State Boundary Comm'n*, 96 Mich App 736, 752; 293 NW2d 691, 699 (1980). Accordingly, the common law doctrine of collateral estoppel must yield to the specific requirements articulated by the Legislature in the statutes and rules that govern such matters.

Furthermore, as discussed already, the decision to annex such territory is essentially a legislative decision resting within the discretion of the Commission:

The annexation question is essentially political, and political considerations cannot be avoided whether the power is exercised by the Legislature itself or by an authority to which the power is delegated. The ultimate decision will be a value judgment based on the particular facts and circumstances of the annexation under consideration.... In this context it is ... relevant that the power here delegated does not involve any vested right or legally protected interest.

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[N]o governmental authority or person has any legal right in the boundaries of a city, village or township. [*Midland Twp. v. Boundary Comm*, 401 Mich 641, 669, 670–671; 259 NW2d 326 (1977).]

Moreover, the Townships have not cited a single case that holds the doctrine of collateral estoppel applies to boundary determinations governed by the Commission. And they ignore that the Court of Appeals, in *Avon Twp, supra*, recognized, at least implicitly, that the Commission may grant a petition for annexation following a previous denial, in accordance with the “plain and unambiguous language of the statute.” Furthermore, and contrary to the Townships’ suggestion, the refile of a petition for annexation is not akin to reviving a failed claim for “black lung,” or other federal benefits, under various dissimilar statutes. (App Br, 47.) Accordingly, the Townships’ argument that the



underlying annexation petition should have been denied on the basis of collateral estoppel is without merit and was properly rejected by the circuit court.

**B. The Commission considered the annexation petition under the applicable statutory criteria.**

At a public hearing and in deciding whether to approve an annexation, the Commission is to consider the *reasonableness* of an annexation petition in light of a criteria checklist of planning and service data for the city and the township, including topography, past and future growth, the need for organized community services, and the practicability of supplying such services in the area proposed for annexation. *Midland Twp*, 401 Mich at 669. As noted, section 9(2) of the Home Rule City Act, MCL 117.9(2), provides for the Commission “to have the same powers and duties as provided under [the State Boundary Commission Act] relating to petitions which propose incorporations.” Section 9 of the State Boundary Commission Act, MCL 123.1009, provides:

(a) Population; population density; land area and land uses; assessed valuation; topography, natural boundaries and drainage basins; the past and probable future urban growth, including population increase and business, commercial and industrial development in the area. Comparative data for the [annexing] municipality, and the remaining portion of the unit from which the area will be detached shall be considered.

(b) Need for organized community services; the present cost and adequacy of governmental services in the area to be [annexed]; the probable future needs for services; the practicability of supplying such services in the area to be [annexed]; the probable effect of the proposed [annexation] and of alternative courses of action on the cost and adequacy of services in the area to be [annexed] and on the remaining portion of the unit from which the area will be detached; the probable increase in taxes in the area to be [annexed] in relation to the benefits

expected to accrue from [annexation]; and the financial ability of the [annexing] municipality to maintain urban type services in the area.

(c) The general effect upon the entire community of the proposed action; and the relationship of the proposed action to any established city, village, township, county or regional land use plan.

The duty of the Commission is to determine whether to approve an annexation petition as a matter of reasonableness in light of the statutory criteria:

We ... conclude that "reasonableness," determined based on the statutorily enumerated criteria, is a sufficient guideline for the exercise of commission discretion. [*Midland Twp v Michigan State Boundary Commission*, 401 Mich 641,669; 259 NW2d 326 (1977).] See also *Avon Twp v State Boundary Comm*, 96 Mich App 736, 750; 293 NW2d 691 (1980); *Chase v State Boundary Comm*, 103 Mich App 193, 204; 303 NW2d 186 (1981) and *Coldwater Twp v City of Coldwater*, 101 Mich App 322, 329; 300 NW2d 556 (1980).]

Since annexations are "unique proceedings" that do not involve any vested rights or interests in municipal boundaries in any person or municipality, this Court has recognized that the ultimate decision is a "value judgment based on the particular facts and circumstances of the annexation under consideration," and does not require detailed particularity by the Commission "in explication of criteria or standards." *Midland Twp*, 401 Mich at 669.

A review of the record makes clear that the annexation decision was supported by competent, material, and substantial evidence. First, the Commission considered the current and future need for community services, along with the cost and adequacy, in light of alternative courses of action. The Commission determined that TeriDee's planned economic development project required connection to public water and sanitary sewer services that are *immediately* available from Cadillac (Vol

2, item 13a, page 5, paragraph 7a) but not Clam Lake or Haring. (Vol 2, Item 13a, page 4, paragraph 7a; Vol 1, Item 4d, page 9.)

Second, with regard to the present cost and adequacy of available services, the Commission considered Haring's planned construction of a water treatment facility and the Townships' claims that the facility would provide economical and adequate service to the subject area. (Vol 2, Item 13a, page 5, paragraph 7b.) However, the Commission found that the construction and infrastructure cost of connecting to those services (if they ever become available) would far outweigh (by an estimated \$1-2 million) the cost of connecting to Cadillac's (which are immediately available). (Vol 1, Item 6d, pages 77-81; Vol 2, Item 13a, page 5, paragraph 7b.)

Third, the Commission considered the practicability of supplying such services to the area. (Vol 2, Item 13a, page 5, paragraph 7c.) Again, the Commission noted that the Townships' claimed ability to provide water services *in the future* was contingent on a variety of factors, including local governmental action, procurement of easements, construction of additional pumping stations and the completion of the planned waste water treatment facility. (Vol 2, Item 13a, page 5, paragraph 7c.) In contrast, the Commission concluded that Cadillac could *immediately* provide public water services.

Finally, the Commission considered the economic impact of the annexation and concluded that the economic development project planned by TeriDee would create new jobs in the area during construction and after it is built.

In summary, the Commission properly considered the annexation criteria set forth in MCL 123.1009 and reasonably concluded, based on the record, that the petition satisfied those requirements. Moreover, in light of *Midland Township* and *Soto*, the Commission's decision reflects that it reasonably applied judgment in weighing the criteria and articulating how the circumstances favored annexation. Given the factors involved in this annexation petition, particularly the economic advantage afforded to the area and the enhancement of cost-effective public services, the annexation decision was reasonable and within the power of the Commission.

## CONCLUSION AND RELIEF REQUESTED

Based upon the foregoing reasons the Commission requests that this Honorable Court deny the Townships' application for leave to appeal.

Respectfully submitted,

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